

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY JOE KORPI, JR.,

Defendant-Appellant.

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UNPUBLISHED

April 24, 2007

No. 266712

Tuscola Circuit Court

LC No. 04-009101-FH

Before: Whitbeck, C.J., and Murphy and Cooper, JJ.

PER CURIAM.

Defendant Timothy Korpi appeals as of right his convictions for second-degree criminal sexual conduct.<sup>1</sup> We affirm.

I. Basic Facts And Procedural History

Before the trial in this matter, Korpi moved to preclude the prosecutor from referring to the complainant as a “victim,” instead requesting that the prosecutor refer to her as a “complainant.” Korpi also requested a bill of particulars to specify the dates of the alleged occurrences of criminal sexual conduct against him. In addition, Korpi opposed the prosecutor’s motion to admit evidence of similar acts, arguing that the evidence was inadmissible under MRE 401, MRE 402, and MRE 404 because it was irrelevant, and because the prosecutor was introducing it for the impermissible purpose of showing propensity to commit bad acts. The prosecutor argued that the evidence of Korpi’s similar acts was relevant because the prosecutor was required to show that any touching that occurred was done for a “sexual purpose.” The prosecutor also argued that prosecutors were allowed to refer to a complainant as a “victim” if there was evidence that the complainant was harmed. The trial court granted the prosecutor’s motion to introduce evidence of similar acts and Korpi’s motion for a bill of particulars. The trial court granted, in part, Korpi’s motion to preclude reference to the complainant as a “victim” during jury selection, opening statements, or the adducement of proofs. The trial court allowed the prosecutor to refer to the complainant as a “victim” during the prosecutor’s closing argument.

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<sup>1</sup> MCL 750.520c(1)(a).

At trial, it was established that the complainant resided with her mother, her sister, her brother, and Korpi on Hess Road while she was between 11 and 13 years of age. Korpi was the boyfriend of the complainant's mother at the time. While the complainant resided on Hess Road, she and her younger sister slept in a bunk bed in the same bedroom. The complainant slept on the top bunk, and her sister slept on the bottom. While the complainant resided on Hess Road, her mother was employed as a nurse, normally working from 7 p.m. until 7 a.m. three days each week. While the complainant's mother was at work, Korpi would stay with the complainant and her siblings. The complainant testified that during the period of time when she resided at the dwelling on Hess Road, she would normally go to bed at 9:30 p.m. during the school year, and "whenever [she] wanted" during the summer. Her sister would normally go to bed between 8:30 and 9:00 p.m. during the school year. According to the complainant, Korpi would enter her bedroom regularly at night in order to turn off the complainant's television.

The complainant testified that on two occasions, Korpi sexually assaulted her while she pretended to sleep. The complainant could not remember when these assaults occurred, but she believed that at least one assault occurred during "winter break" of the year she was in seventh grade. According to the complainant, on the first occasion, Korpi entered her bedroom to turn her television off. The complainant pretended to sleep, and Korpi "came to her bed" and "touched [her] between [her] legs and [her] personal area." The complainant testified that Korpi's hand was over her pajamas, but under the blankets. The complainant explained that she pretended to sleep to determine whether she was dreaming about this event, indicating that this had occurred before. The complainant "moved away" from Korpi, causing him to withdraw from her bedroom and return to the living room. According to the complainant, her sister was sleeping in the bottom bunk during this occasion. The complainant admitted during cross-examination that she did not remember the time of year when this assault occurred. Korpi denied that he ever touched the complainant in a "sexual way."

The complainant also admitted during cross-examination that she did not remember which pajamas she wore on the night that this assault occurred. The complainant was unable to remember what grade she was enrolled in at school when this assault occurred, nor was she able to remember whether this assault occurred near Christmas. The complainant testified that there were occasions when another person would stay overnight with the children at the dwelling on Hess Road, but she could not recall whether that person was present when this assault occurred. However, the complainant testified that she knew that Korpi was the person who entered her room on this occasion, because she was able to observe him in the glow of the night-light.

The complainant testified that on the second occasion where she feigned sleep, she "was watching TV and [Korpi] came in and turned it off and he came to [the complainant's] bed and touched [the complainant] in [her] private areas." The complainant had a night-light in her bedroom, enabling her to observe the person who was accosting her. Korpi denied that this event occurred.

The complainant testified that "right after" Korpi accosted her, she informed a friend about Korpi's actions. The complainant admitted that when she testified during the preliminary examination, she claimed that she initially informed the person who had stayed over night at the Hess Road residence about Korpi's actions. The complainant's friend testified that the complainant informed her of the assaults during the summer before she began the seventh grade.

The complainant also discussed Korpi's actions with a counselor, as well as with a Tuscola County Childrens Protective Services employee.

The prosecutor introduced evidence of two prior acts that, according to the prosecutor, demonstrated that Korpi had a "sexual purpose" when he accosted the complainant. The complainant testified that on one occasion, she, Korpi, and her friend engaged in a game of "truth or dare." The complainant testified that Korpi requested to play "truth or dare" after the complainant and her friend were already engaged in the game. The friend testified that another mutual friend also played the game and that Korpi initiated the game. According to the complainant, during the game of "truth or dare," Korpi dared the complainant to "touch [herself]," which made her feel uncomfortable. In addition, the friend and the complainant testified that Korpi also "dared" the complainant to "blow down [the friend's] shirt." The friend testified that Korpi dared the complainant to "touch him." She also testified that the complainant responded to Korpi's dare by "scrunch[ing] her nose," indicating that she did not want to perform the activity. The friend admitted during cross-examination that she did not recall whether the "truth or dare" game occurred during the winter or the summer. The friend denied taking part in the actual "truth or dare" game, but claimed that she observed it.

Korpi testified that the complainant and her two friends coerced him to engage in the "truth or dare" game while he was downloading music on his computer. He claimed that while he was playing, "there was never anything sexual" about the game. According to Korpi, the other participants "dared" him to "run around the house in the middle of winter." He refused, and fell asleep on the couch in his living room. Korpi denied "daring" the complainant to touch him or herself in an inappropriate way. Korpi claimed that during the game, the girls asked him whether he had ever kissed a boy, to which he responded "yeeee."

The second prior act of Korpi was introduced when the complainant and her friend testified that Korpi viewed pornographic movies in front of them on a computer in the living room of the dwelling on Hess Road. The complainant testified that in the movies Korpi viewed in front of her, the actors would do "[s]tuff that older people do." The complainant claimed that she felt uncomfortable when Korpi watched pornographic movies in front of her. Korpi denied viewing pornographic movies in the presence of the complainant or her friend.

The complainant's friend testified that Korpi frequently talked about "anything that had anything to do with sex" with her and the complainant. The friend also testified that the complainant informed her that Korpi attempted to observe her while she was showering. Korpi presented evidence that arguably undermined the friend's credibility. The complainant's mother testified that the complainant's behavior negatively changed after she began spending time with the friend. Korpi testified that the friend was prohibited from entering his dwelling for a while because she made an odd remark about her father.

Korpi attempted to demonstrate that the alleged assaults did not occur and that the complainant made the accusations against him because she disliked the fact that he provided discipline. Korpi and the complainant's mother testified that the complainant disliked Korpi's requirement that she complete her schoolwork each night, and would occasionally engage in "shouting matches" with him about her schoolwork. The complainant admitted that while she and her siblings resided on Hess Road, Korpi was responsible for assisting them with their schoolwork. The complainant's mother testified that after her family moved in with Korpi, the

complainant's grades improved. Korpi testified that he required the complainant to do her schoolwork as soon as she returned home from school.

Korpi also testified that roughly "a few weeks" before the complainant accused him of accosting her, he prohibited her from playing a sport (either volleyball or basketball) because she received a "C" grade for one of her classes. According to Korpi, when he informed the complainant of this decision, she responded angrily by "slamming her door quite a few times." The complainant denied that she became upset with Korpi because he prohibited her from playing volleyball as a punishment for receiving poor grades at school; she did not remember expressing interest in playing a sport. Several witnesses, including the complainant's mother, also testified that they did not observe Korpi acting in the manner suggested by the complainant.

At the close of the prosecutor's case, Korpi moved for a directed verdict, arguing that the prosecutor failed to prove the elements of second-degree criminal sexual conduct. The trial court denied Korpi's motion. The trial court determined that, if the jury believed the complainant's testimony, there was sufficient evidence for a jury to find beyond a reasonable doubt that Korpi committed two counts of second-degree criminal sexual conduct against the complainant.

The trial court instructed the jury, amongst other things, that:

Now, you have heard some evidence also that was introduced to show that the defendant has engaged in improper sexual conduct for which the defendant is not charged in this trial. If you believe this evidence, you must be very careful to consider it for only one limited purpose, that is to help you judge the believability of testimony regarding the acts on which the defendant is now on trial. You must not consider the evidence for any other purpose. For example, you must not decide that it shows that the defendant is a bad person, or that the defendant is likely to commit crimes. You must not convict the defendant here because you think he's guilty of other bad acts[.]

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To prove this charge the prosecutor does not have to show that [the complainant] resisted the defendant.

After instructing the jury, the trial court acknowledged on the record and out of the presence of the jury that Korpi objected to several of the trial court's instructions in chambers, before the trial court instructed the jury. He noted that Korpi objected to the trial court's decision not to include CJI2d 4.11, and the trial court's decision to include CJI2d 20.26. Korpi had argued that CJI2d 20.26 was inappropriate because force was not a contested issue in the case. The trial court responded to Korpi's objections on the record. The trial court stated:

I didn't think in this particular case that [Instruction] 4.11 is appropriate. I think that there's a special instruction along the same lines reads almost the same way as 20.28, which is prior conduct, sexual conduct, brought out during the course of the trial which is true in this case. And I think that's more specific and more appropriate. And I think that it still protects both sides, because it still is a limiting instruction on how they're supposed to consider that instruction.

The trial court then addressed Korpi's objection to CJI2d 20.26:

Your objection is noted as far as 20.26, I think it's an appropriate instruction in this case. The child is approximately 12 years old at the time of the alleged offense. The only adult in the home is the defendant at the time sitting as a – like a baby-sitter. It is allegedly late at night when the child went to bed...I think that the jury could consider that since there were other people in the house at the time, maybe she should have resisted in some fashion by making an out-cry, did something [sic]. I don't think the law requires her to do that. In this type of case I thought it was an appropriate instruction.

The jury found Korpi guilty of both charges. Subsequently, Korpi moved for a new trial, based on the same grounds presented in this appeal. The trial court denied the motion, determining that the prior acts evidence was properly admitted under MRE 404(b)(1); that the jury instructions were proper; and that there was sufficient evidence upon which the jury could find beyond a reasonable doubt that Korpi committed two counts of second-degree criminal sexual conduct.

## II. Other Acts Evidence

### A. Standard Of Review

Korpi argues that the trial court abused its discretion by admitting "other acts" evidence against him. Korpi argues that the prosecutor introduced the evidence of the prior acts in order to establish his "character as being sexually deviant," which would be an impermissible purpose under MRE 404(b)(1). We review a trial court's decision to admit other acts evidence for an abuse of discretion.<sup>2</sup> An abuse of discretion occurs when a trial court's decision falls outside of the principled range of outcomes.<sup>3</sup>

### B. Legal Standards

To be admissible under MRE 404(b)(1), other acts evidence generally must conform to three requirements: (1) the evidence must be offered for a proper purpose, (2) the evidence must be relevant, and (3) the probative value of the evidence must not be substantially outweighed by its potential for unfair prejudice.<sup>4</sup> A proper purpose for admission is one that seeks to accomplish something other than the establishment of a defendant's character and his propensity

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<sup>2</sup> *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

<sup>3</sup> *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

<sup>4</sup> *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

to commit the offense.<sup>5</sup> Other acts evidence may be admissible to demonstrate proof of motive, opportunity, intent, preparation, scheme, plan, or system.<sup>6</sup>

### C. Applying The Standards

We conclude that the trial court's determination that Korpi's similar prior acts were relevant to establish his intent was not outside of the range of principled outcomes. The prosecutor indicated that the evidence would be offered to demonstrate that Korpi did not mistakenly or accidentally touch the complainant in an inappropriate manner. Therefore, the evidence was offered for a legitimate purpose. The evidence of Korpi's actions during the truth or dare game were relevant to demonstrate his sexual interest in the complainant, and to rebut the possible defense of accident or mistake. The evidence that Korpi viewed pornographic movies in front of the complainant and her friend could have rebutted a possible defense of accident or mistake because such an act could be interpreted as an attempt to desensitize the complainant to sexual misconduct. Although Korpi argues that the danger of unfair prejudice from such evidence substantially outweighed its probative value, we cannot agree where the trial court gave a proper limiting instruction to the jury on the use of the evidence. A jury is presumed to follow its instruction.<sup>7</sup>

## III. Jury Instructions

### A. Standard Of Review

Korpi argues that the trial court committed instructional error when it refused to give his requested limiting instruction regarding the other acts evidence and when it instructed the jury that the prosecutor was not required to show that the complainant resisted. We review the trial court's determination whether the disputed instructions were applicable to the facts of this case for an abuse of discretion.<sup>8</sup> Even if the trial court committed instructional error, reversal is only warranted if a defendant can establish that the error caused a miscarriage of justice, which means that it is more likely than not that the error was outcome determinative, and the error undermined the reliability of the verdict.<sup>9</sup>

### B. CJI2d 4.11

Korpi requested CJI2d 4.11, which instructs the jury that the relevance of other improper acts is limited to certain purposes and that they may not be considered as evidence that the defendant is a bad person or that he is guilty of other bad conduct. However, the trial court issued a different limiting instruction to the jury concerning the use of other-acts evidence. The trial

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<sup>5</sup> *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998).

<sup>6</sup> MRE 404(b)(1).

<sup>7</sup> *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

<sup>8</sup> *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

<sup>9</sup> *People v Hawthorne*, 474 Mich 174, 181-182; 713 NW2d 724 (2006).

court's instruction was based upon CJI2d 20.28, which instructs the jury that evidence of prior improper sexual conduct may only be considered to help judge the believability of testimony. Similar to CJI2d 4.11, CJI2d 20.28 also instructs that the jury may not consider the evidence as indicating that the defendant is a bad person or that he is guilty of other bad conduct.

The trial court's instruction was supported by the record and satisfied Korpi's request that the trial court issue a limiting instruction. Because jurors are assumed to follow a court's instructions,<sup>10</sup> Korpi cannot show prejudice from the giving of this instruction, instead of the instruction he requested.

#### C. CJI2d 20.26

Korpi argues that the trial court erred when it instructed the jury that the prosecutor was not required to show that the complainant resisted him.<sup>11</sup> The trial court did not abuse its discretion by giving the challenged instruction. The instruction was supported by the record and legally accurate.<sup>12</sup>

### IV. Great Weight Of The Evidence

#### A. Standard Of Review

Korpi argues that the trial court erred in refusing to grant him a new trial because the verdict was against the great weight of the evidence. We review for an abuse of discretion the trial court's decision to deny a motion for a new trial on the basis that the verdict was against the great weight of the evidence.<sup>13</sup> A defendant must show that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.<sup>14</sup>

#### B. Legal Standards

Second-degree criminal sexual conduct is governed by MCL 750.520c, which provides, in part:

(1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

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<sup>10</sup> *Graves, supra* at 486.

<sup>11</sup> CJI2d 20.26 instructs that the prosecutor does not have to show that the complainant resisted the defendant.

<sup>12</sup> MCL 750.520i.

<sup>13</sup> *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

<sup>14</sup> *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

The definition of “sexual contact” is governed by MCL 750.520a:

Sexual contact includes the intentional touching of the victim’s . . . intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner . . . .

Here, the complainant testified that Korpi entered her bedroom on two separate occasions, and while she feigned sleep, he touched her in her “personal area.” This testimony alone was adequate to sustain the jury’s conviction of Korpi on the charged offenses.<sup>15</sup> Accordingly, we conclude that the trial court did not abuse its discretion by denying Korpi a new trial.

Affirmed.

/s/ William C. Whitbeck

/s/ William B. Murphy

/s/ Jessica R. Cooper

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<sup>15</sup> MCL 750.520h; *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994).